



Ofwat's final decision in respect of an appeal made by Linden Homes against SSE Water and Southern Water under section 105B of the Water Industry Act 1991

1. Introduction

- 1.1. On 1 July 2011, the Water Industry (Scheme for Adoption of Private Sewers) Regulations 2011 (“the **Regulations**”) came into force, as did the Secretary of State’s scheme for the compulsory adoption of all private sewers, lateral drains and pumping stations in “the area of every sewerage company whose area is wholly or mainly in England” (“the **Scheme**”).
- 1.2. The Regulations and the Scheme give effect to Government policy by placing a duty on sewerage companies to adopt all private sewers, lateral drains and pumping stations (other than those that are expressly exempt). Regulation 3(8) specified 1 October 2011 as the date for the compulsory transfer of all private sewers and lateral drains. Pumping stations must be transferred by 1 October 2016.
- 1.3. The Water Industry Act 1991 (“the **Act**”) provides for an appeal against a company’s compulsory transfer of private sewers and lateral drains. Such an appeal must be lodged under section 105B of the Act which allows an appeal on two grounds, namely:
 - i. that the sewerage company is not under a duty to transfer (for example, because a private sewer is on Crown land and is therefore exempt); or
 - ii. that the adoption would result in serious detriment to the appellant.
- 1.4. On 28 September 2011, the Water Services Regulation Authority (“**Ofwat**”) received an appeal from Utility Law Solutions Ltd of [redacted] acting on behalf of Linden Homes of Victoria House, London Square, Cross Lanes, Guildford, GU1 1UJ (“the **Appellant**”), under section 105B of the Act against the adoption of two sewers (“**Sewer D**” and “**Sewer B**”, or collectively “**the**

Sewers") at Graylingwell Park, Chichester ("**the Site**") by SSE Water.

- 1.5 This appeal is on the ground that the adoption would result in serious detriment to the Appellant. This is for the Appellant to demonstrate.
- 1.6 This document sets out Ofwat's final decision and has the following structure:

The factual background (at part 2),

- Ofwat's procedure (at part 3),
- The issues to be decided (at part 4), and
- Ofwat's final decision (at part 5).

2. Factual Background

The parties

- 2.1 The Appellant is the developer of the Site, which was formerly the Graylingwell Hospital.
- 2.2 SSE Water is the water and sewerage company that has been appointed to serve the Site. It owns the public sewers in the area of the Site.
- 2.3 Southern Water is the water and sewerage company appointed to serve the area adjacent to the Site. Southern Water's area includes the buildings known as the Harold Kydd Unit and Pinewood House, neither of which are owned by the Appellant.

The Site

- 2.4 The Site is a redevelopment of the former Graylingwell Hospital and is being constructed in 9 separate phases. We understand from the Appellant that the original buildings on the Site were served by numerous private sewers and drains. As part of the redevelopment, many of these private sewers have been, or will be, either abandoned or diverted to form part of the new drainage system. Some buildings on the Site are also to be retained either for conversion as part of the redevelopment or in their current use.
- 2.5 The plan attached at Appendix A shows:
- i. the Site boundary;

- ii. the area of Southern Water's appointment that includes the Harold Kydd Unit and Pinewood House;
- iii. Sewer A, which is shown as green on the plan at Appendix A. This serves the Harold Kydd and Pinewood House buildings and is within Southern Water's area of appointment;
- iv. Sewer B, which is shown as red on the plan at Appendix A and is within SSE Water's area of appointment;
- v. Sewer C which is shown as light blue on the plan at Appendix A and is within Southern Water's area of appointment; and
- vi. Sewer D, which is shown as purple on the plan at Appendix A and is within SSE Water's area of appointment, but no longer forms part of this appeal.

Chronology of Key Events

- 2.6 In August 2010, SSE Water became the water and sewerage company for the Site.
- 2.7 By no later than the 1 August 2011, notices of a proposal to adopt the private sewers and or any lateral drains on the Site should have been served on the Appellant. No site-specific notices were served on the Appellant by SSE Water or Southern Water. Southern Water did however serve a notice of a proposal to adopt on all their customers and published a general notice of a proposal to adopt in the local and national press.
- 2.8 On 27 September 2011, the Appellant submitted its appeal to Ofwat against the compulsory adoption of the Sewers. It stated the ground of serious detriment and also queried to whom the Sewers would transfer to in light of no notices being issued.
- 2.9 On 7 November 2013, SSE Water confirmed that Sewer D had been diverted by the Appellant and the new sewer was now the subject of a section 104 agreement with SSE Water. This was confirmed by the Appellant on 29 January 2014.
- 2.10 Given the change in circumstances, the Appellant has decided (and Ofwat agrees) that there is no need to continue with this aspect of the appeal. This appeal is therefore only concerned with Sewer B.

- 2.11 On 24 January 2014, Southern Water stated that its view was that Sewer B should not be considered the responsibility of SSE Water. This is because Sewer B serves only properties which are located in Southern Water's area, namely the Harold Kydd Unit and Pinewood House, and Southern Water collects the sewerage charges in respect of this sewer. As a result Southern Water believes that Sewer B should transfer to it.
- 2.12 On 2 June 2014, the Appellant confirmed that it no longer needed to divert Sewer B to facilitate the planned development. This fact is relevant to Ofwat's decision on the Appellant's claim that adoption would result in serious detriment to it, as explained in paragraphs 5.9 and 5.10.
- 2.13 On 24 December 2014, Ofwat wrote to the Appellant advising them that a draft determination would be issued to ensure clarity about the ownership of Sewer B only. Additionally, letters were sent to SSE Water and Southern Water advising that Ofwat was minded to transfer Sewer B to Southern Water and invited comments or objections to this approach, to be received by 16 January 2015.
- 2.14 On 8 January 2015, Southern Water wrote to Ofwat advising that it believed that Sewer B had transferred to them on 1 October 2011 as it served a notice of the transfer on all their customers and published a general notice of transfer in the local and national press.
- 2.15 16 January 2015, the deadline for comments on Ofwat's proposal to transfer the whole of Sewer B to Southern Water passed. No comments were received from SSE Water.
- 2.16 On 26 January 2015, Ofwat wrote to the Department for Environment, Food and Rural Affairs to notify them that no site-specific notice was served on the Appellants. This was necessary because a failure to serve notices is enforceable only by the Secretary of State under section 18 of the Act. However, the failure to serve site-specific notices does not affect Ofwat's decision in this case because notwithstanding the failure to serve a site-specific notice, the Appellant lodged an appeal within the statutory deadline. We are therefore able to make a determination on the transfer of Sewer B.

The Appellant's submission

- 2.17 The Appellant stated in their original appeal form and accompanying letter that the compulsory adoption of Sewer B would cause it serious detriment at

the time the appeal was lodged because Sewer B becoming a public sewer in its current location would not be compatible with the planned re-development of the Site. It would therefore be necessary for the Appellant to apply to the relevant company to divert Sewer B which it considered would be more a costly and time consuming process than diverting what would otherwise be a private sewer.

- 2.18 The Appellant also considered that the transfer of Sewer B at that time would not have been beneficial to either the sewerage company or those properties currently served by it, because under the original plans, the sewer would have been improved when the developer diverted the sewer to facilitate the planned development.
- 2.19 However, as stated at paragraph 2.12 above, the Appellant advised Ofwat on 2 June 2014 that it no longer needed to divert Sewer B to facilitate the planned development.

3. Ofwat's procedure

- 3.1 Since receiving the appeal, Ofwat has gathered and considered the information necessary to make this decision. This has included liaising with both SSE Water and Southern Water to seek their views where necessary.
- 3.2 On 20 February 2015, Ofwat issued a draft decision to the Appellant, SSE Water and Southern Water for their consideration. That decision set out the reasons why Ofwat considered that Sewer B should transfer to Southern Water, and why such a transfer would not result in serious detriment to the Appellant.
- 3.3 We received no comments on the draft decision from the Appellant. SSE Water responded to say that it was content with the proposals in the draft decision and had no specific representations to make. Southern Water also responded to confirm that it had no comment to make on the draft decision.
- 3.4 Ofwat has not sought to respond to every point made by the parties in their submissions and correspondence in advance of making this final decision. However, where Ofwat has needed clarification or additional information from the parties, it has been obtained. Ofwat is satisfied that it now has sufficient information to issue a final decision.

4. The issues to be decided

4.1 The issues to be decided are whether:

- SSE Water has a duty to adopt Sewer B; and
- the proposed transfer would result in serious detriment to the Appellant.

5. Ofwat's final decision

The pipework

4.1. Section 219 of the Act sets out statutory definitions of the terms 'drain', 'lateral drain' and 'sewer' which are applicable to the Regulations and the Scheme. We set out those definitions in Appendix B. Sewer B is a sewer in accordance with this definition.

Duty to adopt (section 105B (3)(a) of the Act)

4.2. Regulations 5(1) and 5(2) (Exempt private sewers and exempt private lateral drains) set out that a private sewer or private lateral drain is exempt for the purposes of the Scheme if the sewer or lateral drain:

- i. is owned by a railway undertaker; or
- ii. is situated on or under "Crown land" (as defined in Regulation 5(4)) (and Regulation 5(2)(b) also applies).

4.3. Ofwat is satisfied that neither of the exemptions apply to Sewer B and therefore:

- i. Sewer B is not exempt from the Scheme; and
- ii. SSE Water has a duty under the Regulations and the Scheme to adopt Sewer B.

Transfer of Sewer B to Southern Water

5.4 As set out in paragraph 2.5, Sewer B is situated within the area of two sewerage companies namely SSE Water's and Southern Water's areas. Where it is established that there would be no serious detriment to an appellant on the transfer of a private sewer, in accordance with the Scheme, it may be appropriate to transfer such section of a sewer that falls within a particular sewerage company's area to that same company. In this case, should it be concluded that there would not be serious detriment to the

Appellant were Sewer B to be adopted, this would result in:

- Sewer A belonging to Southern Water;
- Sewer B belonging to SSE Water; and
- Sewer C belonging to Southern Water.

- 5.5 Sections 102 and 105A of the Act permit a sewerage company to adopt a sewer which is located in another company's area but which serves the whole or any part of its area. This would therefore allow for the whole of Sewer B to be transferred to either SSE Water or Southern Water.
- 5.6 Having sought views from both SSE Water and Southern Water about who they consider should adopt Sewer B in the event of Ofwat finding that there would be no serious detriment to the Appellant, both SSE Water (confirmed on 7 November 2013) and Southern Water (confirmed on 24 January 2014 and 8 January 2015) stated that they believed any adoption should be by Southern Water as it currently collects charges from the customers at the Harold Kydd Unit and Pinewood House building.
- 5.7 Additionally, Defra's guidance on the transfer of private sewers¹ states that it would not expect a transfer to result in a change to existing billing arrangements.
- 5.8 In accordance with the Scheme, SSE Water has the duty to adopt Sewer B. Given this, Ofwat could make a determination transferring ownership of Sewer B to SSE Water. However, Ofwat does not consider that this would be appropriate, considering that one of the Government's aims of establishing the Scheme was to provide for a better, integrated management of the sewerage system. We do not consider that transferring Sewer B to SSE Water would work towards that integration given its location in respect of sewer A and sewer C, or would be in the best interests of any customers that would utilise Sewer B. Therefore, we consider that Sewer B should be adopted by Southern Water.

Serious detriment (section 105B(3)(a) of the Act)

¹ The private sewers transfer regulations – provisional non-statutory guidance on private sewers transfer regulations. June 2011

- 5.9 The Appellant considered that the transfer of Sewer B would be seriously detrimental for the reasons set out at paragraph 2.17. The Appellant's case for serious detriment was that if Sewer B were to transfer under the Scheme, the location of what would then have been a public sewer would not be compatible with the redevelopment of the Site. There would be an increase in time and money spent on diverting the now public sewer when compared with diverting what would otherwise be a private sewer.
- 5.10 On 2 June 2014 the Appellant notified Ofwat that Sewer B no longer needed to be diverted to facilitate the planned development of the Site. As there is no longer a requirement to divert Sewer B, Ofwat considers that the main submission made by the Appellant for serious detriment is not applicable and there would be no actual effect on the Appellant should Sewer B be adopted.
- 5.11 Ofwat does not consider, therefore, that any serious detriment would result from the transfer of Sewer B.

European Convention on Human Rights

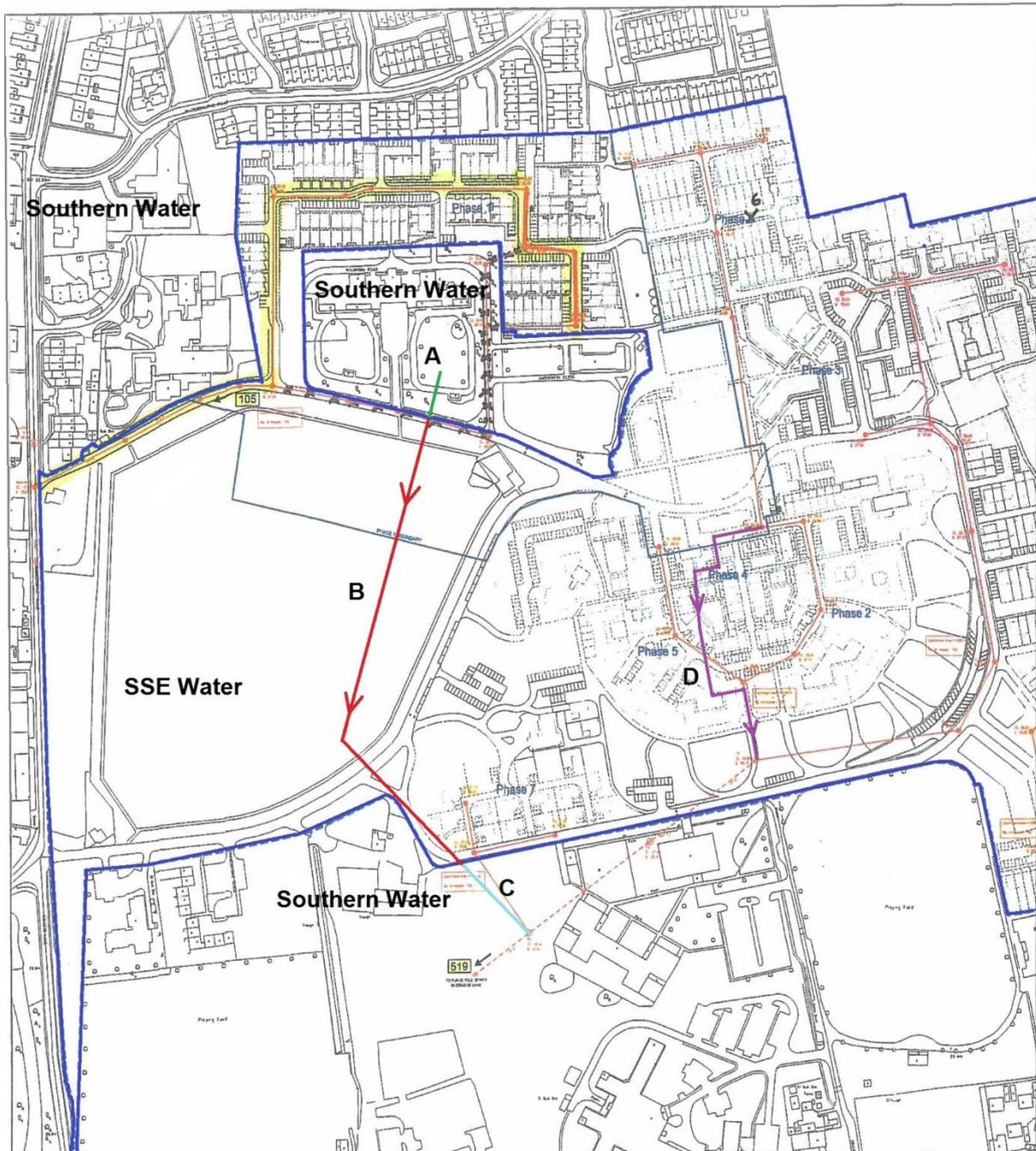
- 5.12 Ofwat has considered separately the Appellant's appeal by reference to Article 1 of the First Protocol of the European Convention on Human Rights which provides:
- (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
 - (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

We have concluded that a payment of compensation to the Appellant would not be needed on the transfer of Sewer B to Southern Water in order to ensure a fair balance between the Appellant's interests and the public interest in a more integrated sewerage system. Furthermore, we do not consider that the Appellant would suffer serious detriment if compensation were not paid to the Appellant on a transfer of the Sewer to Southern Water.

Conclusion

- 5.13. Ofwat's final decision is that Sewer B should transfer to Southern Water with effect from **13 April 2015**.
- 5.14. In making its decision, under section 105B(9)(a) of the Act, Ofwat is able to specify conditions including payment of compensation. Ofwat has concluded that in this case it would not be appropriate to specify any conditions, including any condition directing the payment of compensation.

Appendix A – Site Plan



Appendix B – Definitions set out in section 219 of the Act

“drain” means (subject to section (2) below) a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage;

“lateral drains” means –

- a) That part of a drain which runs from the curtilage of a building (or buildings or yards within the same curtilage) to the sewer with which the drain communicates or is to communicate; or
- b) (if different and the context so requires) the part of the drain identified in a declaration of vesting made under section 102 above or in an agreement made under section 104 above;

“sewer” includes (without prejudice to subsection (2) below) all sewers and drains (not being drains within the meaning given by this subsection) which are used for the drainage of buildings and yards appurtenant to buildings;

Subsection (2) of the Act:

(2) In this Act—

(a) references to a pipe, including references to a main, a drain or a sewer, shall include references to a tunnel or conduit which serves or is to serve as the pipe in question and to any accessories for the pipe; and

(b) references to any sewage disposal works shall include references to the machinery and equipment of those works and any necessary pumping stations and outfall pipes;

and, accordingly, references to the laying of a pipe shall include references to the construction of such a tunnel or conduit, to the construction or installation of any such accessories and to the making of a connection between one pipe and another.